

**IN THE MISSOURI SUPREME COURT  
SUPREME COURT NO. SC93379**

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**ANDRO TOLENTINO,**

**Appellant**

**v.**

**STARWOOD HOTELS & RESORTS WORLDWIDE, et al.,**

**Respondents**

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**Appeal from the Circuit Court of Jackson County, Missouri  
16th Judicial Circuit  
Case No. 1016-CV12176  
The Honorable W. Brent Powell, Judge**

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**APPELLANT'S SUBSTITUTE BRIEF**

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## **JURISDICTIONAL STATEMENT**

Appellant Andro Tolentino appealed the March 8, 2012 Order and Judgment of the Circuit Court of Jackson County granting summary judgment to Respondents, Starwood Hotels & Resorts Worldwide, Inc., and Westin Hotel Management, L.P. (hereinafter “the Westin”). Appellant’s petition alleged Respondents had violated the Missouri Minimum Wage Law (“MMWL”). R.S.Mo § 290.500, *et seq.* Section 290.527 of the MMWL provides employees with a cause of action against their employers for the underpayment of wages. This action is one concerning the issue of whether a joint employer’s duty to compensate an employee is discharged if the other joint employer’s failure to pay wages constitutes unforeseeable criminal activity.

The March 8, 2012 Order and Judgment granting summary judgment was a final judgment satisfying the jurisdictional prerequisites under Missouri Rule of Civil Procedure 74.01. Under Missouri law, a party aggrieved by a trial court’s judgment in a civil action can appeal “from any...[f]inal judgment in the case....” R.S.Mo. § 512.050(5).

Tolentino timely filed his Notice of Appeal on April 09, 2012. (LF1281.) On April 2, 2013, the Court of Appeals for the Western District of Missouri affirmed the trial court’s decision. On April 17, 2013, Tolentino filed a Motion for Rehearing/Application for Transfer with the Western District Court of Appeals that was overruled and denied on April 30, 2013. On May 15, 2013, Tolentino filed an Application for Transfer that was sustained by this Court on August 13, 2013.

## **STATEMENT OF FACTS**

Appellant, Andro Tolentino, emigrated from the Philippines to the United States on an H-2B work visa in 2007. (LF0402, 38:5-12; 39:7-11.) The Respondents, Starwood Hotels and Resorts Worldwide, Inc., and Westin Hotel Management, L.P. (hereinafter “the Westin”), hired Tolentino through an employment staffing agency named Giant Labor Solutions, LLC (“GLS”) (LF0404, 69:12-16) to work as a Room Attendant at the Westin Crown Center Hotel in February 2008. (LF0405, 70:12-16.) He worked there until April 2008. (LF0406, 77:7-9.)

Between April 13 and April 26, 2008, Tolentino cleaned 122 hotel rooms and worked a total of 55 hours at the Westin. (LF1278). His final paycheck for that time period was due on May 2, 2008.<sup>1</sup> (LF1034, ¶177; 1189-91.) The “paycheck” Tolentino received from GLS for that pay period was \$0.00. (LF1191; 1274, ¶ 177.) On May 6, 2009, GLS was indicted for several crimes, including racketeering, human trafficking, fraud in foreign labor contracting, money laundering, extortion, mail fraud, and visa fraud. (LF1024, ¶ 117.)

Before he was hired as a Room Attendant, Tolentino was required to interview with the Westin. (LF1026-27, ¶ 130.) During his initial interview, Tolentino was told by

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<sup>1</sup> Appellant notes that the record contains a clerical error stating that “the final paycheck for the time period April 13, 2008 to April 26, 2010, was due on May 2, 2011.” The paycheck and paystub contained at LF1191 provide the actual pay period (April 13, 2008 to April 26, 2008) and the actual due date (May 2, 2008).

Westin's Director of Housekeeping that he would be paid by the number of rooms he cleaned. (LF1027, ¶ 132.) The Westin, not GLS, made the final decision to hire Tolentino. (LF1026-27, ¶ 130.)

As a part of his orientation paperwork, Tolentino was required to sign both the ABC's of Housekeeping checklist and the Westin's Room Cleanliness Standards policy. (LF1028, ¶ 138.) Westin's training of Tolentino included watching the ABC's of Housekeeping video, being paired with a more experienced associate to follow his work for a couple of days, and then being given between five or six of his own rooms to clean for a time, which were inspected by a supervisor or manager. (LF1028, ¶¶ 138-39.) Tolentino's training lasted for two weeks. (LF1028, ¶ 140.)

Every morning he worked, Tolentino was required to attend meetings directed by Westin management that would last between 15 to 30 minutes. (LF1032, ¶¶ 157-158.) At those meetings, Tolentino received his daily assignments and management discussed projects for the day, various types of cleaning, what was going on in the hotel, occupancy, groups that were in-house, the number of inspections management wanted supervisors to do, VIP guests, corporate numbers, and comparisons with other hotels. (LF1032, ¶ 159.) Throughout the day Westin supervisors also inspected the rooms cleaned by Tolentino and other Room Attendants. (LF1029, ¶¶ 141-42). If a guest room was not properly cleaned, Westin's supervisors would require Tolentino to return promptly to the room and clean it. (LF1030, ¶ 150.)

The job responsibilities of Room Attendants hired directly by the Westin were identical to those hired indirectly. (LF1028, ¶ 137.) Westin supervisors used a checklist

for inspecting guest rooms that included approximately 28 items that Room Attendants were required to complete in the course of cleaning a room. (LF1029, ¶¶ 141-144.) With this checklist as a measure of performance, Tolentino was required to meet a 90 percent cleanliness standard. (LF1029, ¶ 144-45.) If he fell below 80 percent, supervisors were required to report him to management, in which case he might be subject to retraining. (LF1030, ¶ 148.) These cleanliness standards were the same for Room Attendants hired directly (*i.e.*, not through an employment staffing agency) by the Westin. (LF1030, ¶ 147.) The Westin required Room Attendants hired through GLS to sign its room cleanliness standards policy. (LF1004, ¶ 46.) The signed copies of the ABC’s checklist were retained until GLS was indicted. (LF1004, ¶ 46.) After the indictment, the copies were destroyed by the Westin. (LF1004, ¶ 46.)

Westin supervisors regularly discussed the performance of Room Attendants hired through GLS with the Director of Housekeeping and also gave her evaluations of Room Attendants’ job performance. (LF1031-32, ¶¶ 153, 156.) The Westin tracked the number of rooms completed by Tolentino and the other Room Attendants on a “room board,” which was then entered daily by supervisors on what was called a “productivity sheet.” (LF1030-31, ¶ 151.) These productivity sheets were also loosely used to track the time worked by Room Attendants. (LF1031, ¶ 152; LF1033-34, ¶ 171.) These productivity/time sheets were stored by the Director of Housekeeping and also sent to GLS. (LF1004, ¶ 46.) On average, Tolentino worked a minimum of approximately 36 hours every two weeks while at the Westin. (LF1034, ¶ 175.)

Typically, the Westin set the schedule for Tolentino and other Room Attendants 18 days before work was to commence. (LF1033, ¶ 163.) In addition, the Westin made daily assignments of the rooms that were to be cleaned by Tolentino and the other Room Attendants. (LF1033, ¶ 164.)

All of the uncompensated work at issue was performed by Tolentino on the Westin's premises. (LF1033, ¶ 165.) During his shift, Tolentino was expected to remain on Westin premises. (LF1033, ¶ 165.) At no time did Tolentino perform work for GLS for which GLS reimbursed him—he performed work for the Westin for which the Westin was supposed to reimburse him through GLS. (LF1034-35, ¶¶ 178-79.) All of the equipment used by Tolentino was supplied by the Westin. (LF1013, ¶¶ 79; LF1033, ¶ 169.) All Room Attendants, including Tolentino and others from Giant Labor, were also required to wear a uniform provided by the Westin and wear a badge that displayed: “Westin Crown Center.” (LF1033, ¶ 167.)

During the time of Tolentino's employment at the Westin from February 7 to April 22, no less than 11 workers supplied by GLS were consistently assigned to the Westin. (LF1034, ¶ 175.) Some Room Attendants hired through GLS had worked at the Westin for more than a year and one worked up to four years. (LF1034, ¶ 172.)

In April 2008, the Westin terminated Tolentino's employment because, as he was told, the Westin was displeased with his performance. (LF1019, ¶ 97; LF1027, ¶134; LF0406, 77:7-9.) The Westin confirmed in discovery that Tolentino was fired because he was unable to clean guest rooms fast enough. (LF1019, ¶ 97). The Westin acknowledged

it had the power to direct GLS to no longer place a Room Attendant at its hotel based on job performance. (LF1018, ¶ 96; LF1028, ¶ 135.)

### **Procedural History**

On April 21, 2010, Appellant Andro Tolentino brought a claim against the Westin alleging an underpayment of wages for the work he performed at the Westin Crown Center Hotel in violation of the MMWL, which requires employees be compensated with minimum wages for each hour worked and with overtime compensation for work performed over 40 hours a week. (LF0010, 1278.) In his petition, Tolentino alleged that the Westin and GLS were joint employers, and therefore jointly and severally responsible for payment of minimum wages and overtime compensation owed to him. (LF0004, ¶ 18.)

Tolentino filed his present second amended petition for damages on August 19, 2010. (LF0011.) After the Westin filed a Motion for Summary Judgment on August 04, 2011 (LF0131), the trial court issued an Order and Judgment granting the motion. (LF1277.) For purposes of deciding the motion, the trial court assumed that the Westin and GLS were joint employers of the Tolentino. (LF 1277-78.) The trial court, however, held that the Westin did not violate the MMWL because one joint employer cannot be held liable for nonpayment of wages to an employee if the other joint employer's nonpayment of wages was an unforeseeable criminal act. (LF 1279.)

Tolentino timely filed his Notice of Appeal on April 09, 2012. (LF1281.) On April 2, 2013, the Court of Appeals for the Western District of Missouri affirmed the trial court's decision. On April 17, 2013, Tolentino filed a Motion for Rehearing/Application

for Transfer with the Western District Court of Appeals that was overruled and denied on April 30, 2013. On May 15, 2013, Tolentino filed an Application for Transfer, which this Court sustained on August 13, 2013.

**POINT RELIED ON**

- I. The trial court erred in granting summary judgment against Appellant because the Missouri Minimum Wage Law makes joint employers jointly and severally liable for the payment of minimum wages and overtime compensation due employees regardless of whether the failure to pay is due to criminal activity of a joint employer in that neither the MMWL nor the FLSA contain any exception to liability for wage deductions that are, or may be characterized as, the unforeseen criminal activity of a joint employer.**

*Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403 (7<sup>th</sup> Cir. 2007)

*Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947)

*Virginia D., v. Madesco Invest. Corp.*, 648 S.W.2d 881 (Mo. 1983).

*Fields v. Advanced Healthcare Mgmt., LLC.*, 340 S.W.3d 648

(Mo. App. S.D. 2011)

R.S.Mo. § 290.505.4

29 C.F.R. § 791.2

8 C.S.R. § 30-4.010(1)

## ARGUMENT

The trial court erred when it failed to recognize that under the Fair Labor Standards Act (“FLSA”), companies or persons found to be joint employers are jointly and severally liable for the payment of all minimum wages and overtime compensation *without exception*. This has been common ground of the joint employer doctrine for over 65 years. It was with this unwavering understanding that the people of Missouri passed the Missouri Minimum Wage Law (“MMWL”), R.S.Mo. 290.500, *et seq.*, by popular initiative on November 7, 2006, and specifically incorporated the FLSA’s regulations, which include the joint employer regulation.

The trial court’s decision to create an exception to this doctrine for wage deductions by a joint employer that are, or may be characterized as, unforeseeable criminal activity was baseless and unprecedented. Nothing in the text or structure of the FLSA, the MMWL, or the joint employer doctrine provides an exception for payment of earned wages due to unforeseeable crimes. Moreover, the MMWL explicitly provides that it is to be interpreted in accordance with the FLSA, not the common law of torts—the basis for the trial court’s exception. Further, the existence of criminal penalties in the FLSA confirms that such an exemption does not exist. These penalties mirror the FLSA’s civil remedies, but have never been thought to nullify those remedies.

The trial court’s exception to the joint employer doctrine is impossible to reconcile with the MMWL’s remedial purpose. The Westin’s decision to pay Tolentino indirectly through GLS was a calculated risk that gambled with his wages. The trial court’s decision requires Tolentino to bear the burden of this risk. Allocating burdens onto those who are

the least capable of shouldering them does not foster the public good and is wholly inconsistent with the MMWL’s remedial purpose.

Even the common law of torts, which the trial court imported into wage and hour law, does not support its decision. The history of wage and hour law in this country is a rejection of the common law’s “liberty of contract.” At no point, however, has the law of torts been considered applicable in the wage and hour context. In contrast to the common law, wage deductions by a joint employer are considered foreseeable as a matter of law under the FLSA. Under the common law of Missouri, moreover, the special nature of the employer-employee relationship creates an exception to the unforeseeable criminal activity doctrine such that an employer will be held responsible for a third party’s—or in this case, a joint employer’s—unforeseeable criminal activity.

The upshot of the trial court’s exemption is that it will provide an ostrich defense to the employer who contracts with rapacious or insolvent employee staffing agencies; namely, that it was unforeseeable that the other joint employer would pocket, rather than pay, the employee’s wages. Certainly, such an exemption would have been written into the law or recognized by a court at some point in the doctrine’s 65-year history. But it was neither written into the regulation, nor recognized by judicial decision. The trial court’s decision is the first and only one in the doctrine’s 65-year history.

The need for consistent and steady enforcement of the joint employer doctrine is apparent, particularly given the increasing use of employee staffing agencies by employers. That is because “when a contractor has no business or personal wealth at risk, he may be tempted to stiff the workers . . . and then treating the principal firm as a

separate employer is essential to ensure that the workers' rights are honored.” *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 409 (7<sup>th</sup> Cir. 2007). This statement aptly describes GLS's operation and its practice of making illegal deductions from Tolentino's paycheck.

Practically speaking, the trial court's holding will leave a large segment of workers employed through employee staffing agencies without any remedy to recover the wages they duly earned. To avoid such an inequitable result, this Court need only apply the joint employer regulation as written and understood for over 65 years and hold that all joint employers are jointly and severally liable for the payment of all minimum wages and overtime compensation owed to their employees.

## **STANDARD OF REVIEW**

A motion for summary judgment is decided as a matter of law, and appellate review of such a decision is *de novo*. *City of Hazelwood v. Peterson*, 48 S.W.3d 36, 38 (Mo. 2001). Summary judgment should be granted when “there is no genuine issue as to any material fact and...the moving party is entitled to judgment as a matter of law.” Mo. R. Civ. P. 74.04(c)(6)(2009). In reaching such a conclusion, it is crucial that the movant demonstrate its “undisputed right to judgment as a matter of law.” *ITT Comm. Fin. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. 1993). The Court in this case should review the record in a light most favorable to the Appellant and “need not defer to the trial court’s order granting summary judgment.” *Id.* at 376.

Under the joint employer doctrine, summary judgment should seldom be granted because “the question [of] whether a defendant is a plaintiffs’ joint employer is a mixed question of law and fact” that is “especially well-suited for jury determination. . .” *Zheng v. Liberty Apparel Co.*, 617 F.3d 182, 185-86 (2d Cir. 2003) (quoting *Mendell v. Greenberg*, 927 F.2d 667, 673 (2d. Cir. 1990)); *see also Barfield v. New York City Health & Hosp. Corp.*, 537 F.3d 132, 143-44 (2d Cir. 2008) (“Because of the fact-intensive character of a determination of joint employment, we rarely have occasion to review determinations made as a matter of law on an award of summary judgment.”).

**I. The trial court erred in granting summary judgment against Appellant because the Missouri Minimum Wage Law makes joint employers jointly and severally liable for the payment of minimum wages and overtime compensation due employees regardless of whether the failure to pay is due to criminal activity of a joint employer in that neither the MMWL nor the FLSA contain any exception to liability for wage deductions that are, or may be characterized as, the unforeseen criminal activity of a joint employer.**

After acknowledging that there were genuine issues of material fact regarding whether the Westin was Tolentino’s joint employer, the trial court assumed it was for purposes of summary judgment. (LF1277-78.) The trial court, however, created an unprecedented exception to the joint employer doctrine, holding that the Westin could not be liable for the payment of Tolentino’s wages because the nonpayment of wages by joint employer GLS was a criminal act that was not foreseeable—an argument first made by Respondents in their reply brief. (LF1197.)

Since its inception over 65 years ago in the case of *Rutherford Food Corp., v. McComb*,<sup>2</sup> courts have never suggested that a joint employer can avoid responsibility for the nonpayment of wages because the nonpayment of wages by its joint employer was an unforeseeable criminal act. Neither did Westin provide, nor did the trial court rely upon,

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<sup>2</sup> 331 U.S. 722 (1947). Although the Court did not use the language “joint employer,” the *Rutherford* case is now cited as the case establishing the doctrine. *See Reyes*, 495 F.3d at 409; *Zheng*, 355 F.3d at 68-69 (applying *Rutherford*’s six-factor test).

any legal authority recognizing such an exception to the joint employer doctrine. The absence of any positive law on the subject is telling: once a joint employer relationship is found, both employers are jointly and severally liable for the payment of the employee's wages—end of story.

As explained below, this heretofore unrecognized exception to the joint employer doctrine finds no basis in the text, structure, or history of the MMWL, FLSA, or joint employer law. The joint employer doctrine holds joint employers responsible for each other's unlawful conduct (*e.g.*, not paying employees), therefore the non-compensation of employees is foreseeable as a matter of law. Not even the common law of torts, upon which the trial court relied, provides support for this *ipse dixit* exception created by the court.

**A. There is no legal authority for the trial court's unforeseeable criminal activity exception as applied to wage deductions by a joint employer, which are foreseeable as a matter of law**

The text of the joint employer regulation, the regulatory structure of the FLSA, the historical background and the problems that gave rise to the enactment of wage and hour laws in this country, all confirm that the trial court's exception is baseless. In examining the intent of the people when they enacted the MMWL, "the Court may review the earlier versions of the law, or examine the whole act to discern its evident purpose, or consider the problem that the statute was enacted to remedy." *United Pharm. Co. of Mo., Inc., v. Missouri Bd. of Pharm.*, 208 S.W.3d 907, 911-912 (Mo. 2006) (quoting *In re M.D.R.*,

124 S.W.3d 469, 472 (Mo. 2004)). Taking these considerations into account, there is no support whatsoever for the exception created by the trial court.

1. **The joint employer regulation as applied to the MMWL, which is to be interpreted according to the FLSA, not the common law, contains no exception for wage deductions that are, or may be characterized as, unforeseen criminal activity.**

Under the MMWL, “employers” are required to pay their employees the minimum wage for all hours worked and overtime compensation for all hours worked in excess of 40 hours a week. R.S.Mo. §§ 290.502; 290.505. Just as under the FLSA’s definition,<sup>3</sup> under the MMWL an “employer” is “any person acting directly or *indirectly* in the interest of an employer in relation to an employee.” R.S.Mo. § 290.500(4) (emphasis added). As this broad definition confirms, an employee may have more than one employer at a time. The joint employer regulation echoes these definitions, providing that “a single individual may stand in the relation of an employee to two or more employers at the same time[.]”<sup>4</sup> and that “a joint employment relationship generally will be considered to exist in situations such as . . . [w]here one employer is acting directly or

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<sup>3</sup> 29 U.S.C. § 203 (“any person acting directly or indirectly in the interest of an employer in relation to an employee . . .”).

<sup>4</sup> 29 C.F.R. § 791.2(a).

*indirectly* in the interest of the other employer (or employers) in relation to the employee. . .” 29 C.F.R. § 791.2(b)(2) (emphasis added).<sup>5</sup>

The interpretation of the MMWL is to follow the FLSA regulations promulgated by the Department of Labor, which include the joint employer regulation. *See* R.S.Mo. § 290.505.4.<sup>6</sup> The joint employer regulation provides that “all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act . . .” 29 C.F.R. § 791.2(a).<sup>7</sup> The plain language of this regulation

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<sup>5</sup> The Family and Medical Leave Act (“FMLA”), which mirrors the FLSA’s joint employer regulations, specifically provides in its regulations that “joint employment will ordinarily be found to exist when a temporary placement agency supplies employees to a second employer.” 29 C.F.R. § 825.106(b)(1); *see also Bastian v. Apt. Invest. and Mgmt. Co.*, No. 07c2069, 2008 WL 4671763, \*3 (N.D. Ill. Oct. 21, 2008) (noting significance of FMLA regulation regarding employee staffing agencies for FLSA joint employment).

<sup>6</sup> *See also Fields v. Advanced Healthcare Mgmt., LLC.*, 340 S.W.3d 648, 654-55 (Mo. App. S.D. 2011) (citing 8 C.S.R. § 30-4.010(1) (joint employer doctrine held to apply to the MMWL)).

<sup>7</sup> *See also Karr v. Strong Detective Agency, Inc.*, 787 F.2d 1205, 1207 (7<sup>th</sup> Cir. 1985) (citing 29 C.F.R. § 791.2(a)) (“All joint employers are individually responsible for compliance with the FLSA.”); *Donovan v. Agnew*, 712 F.2d 1509, 1511 (1<sup>st</sup> Cir. 1983) (joint employers are “jointly and severally liable under the FLSA for unpaid wages”).

thus mandates that joint employers be held responsible for the payment of minimum and overtime wages to their employees and does so *without exception*.

The unprecedented exception to this doctrine created by the trial court flouts this Court’s admonition about reading terms into a text and respecting the policy decisions of legislative bodies:

Where the language of the statute is unambiguous, courts must give effect to the language used by the legislatures. Courts lack authority “to read into a statute a legislative intent contrary to the intent made evident by the plain language. There is no room for construction even when the court may prefer a policy different from that enunciated by the legislature.”

*Keeney v. Hereford Concrete Prod. ’s, Inc.*, 911 S.W.2d 622, 624 (Mo. 1995) (citation omitted).<sup>8</sup>

The trial court thus cannot properly interpolate the common law doctrine of unforeseeable criminal activity into the MMWL. Nothing in the text of the MMWL remotely suggests that Missouri’s common law should override the governing statutes and regulations in the interpretation of the MMWL. Quite to the contrary, the intent of the people of Missouri was to use the FLSA as an interpretive guide and adopt the FLSA’s

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<sup>8</sup> Such canons also apply to the joint employer regulation because “[r]egulations are interpreted according to the same rules as statutes.” *Dept. of Soc. Servs., Div. of Med. Servs. v. Senior Citizens Nursing Home Dist.*, 224 S.W.3d 1, 9 (Mo. App. W.D. 2007).

joint employer doctrine as reflected in the overtime provision of the MMWL, which provides:

[T]his section shall be interpreted in accordance with the Fair Labor Standards Act . . . and *any regulations promulgated thereunder*.

R.S.Mo. § 290.505.4 (emphasis added) (internal citations omitted).

Likewise, the Missouri Department of Labor’s regulations state that for “interpreting and enforcing the Missouri Minimum Wage Law, [the department] will follow *the written regulations* established by the United States Department of Labor pertaining to the Fair Labor Standards Act, which are incorporated by reference.” 8 CSR 30-4.010(1) (2010) (emphasis added.) As these provisions make clear, the MMWL must be interpreted in accordance with the FLSA and its regulations without resort to common law principles.

This Court should reverse the trial court’s decision that creates an unforeseeable criminal activity exception to the joint employer doctrine because it lacks any grounding in the text of the joint employer regulation and because it conflicts with policy adopted by the people of Missouri.

**2. The regulatory structure of FLSA precludes reading an exception for unforeseeable criminal activity into the joint employer doctrine.**

The FLSA’s regulatory structure, which provides for criminal penalties in tandem with civil remedies, confirms that an exception for unforeseeable criminal wage deductions by a joint employer was not intended. Under the FLSA, an employer may be

criminally liable for the failure to pay wages. 29 U.S.C. § 216(a). With the exception of the standard of proof and willfulness element, the FLSA’s “criminal offenses mirror civil infractions” and may include violations of the FLSA by employers who withhold minimum wage and overtime pay or who require that employees kick back a portion of their wages. *See* THE FAIR LABOR STANDARDS ACT, ABA SECTION OF LABOR AND EMPLOYMENT LAW, 17.121-122 (Ellen C. Kearns, *et al.* eds., 2010).

Indeed, the FLSA’s anti-kickback regulation, 29 C.F.R. § 531.35, prohibits precisely the H-2B visa fee paycheck deductions that are at issue in this case. *See Teoba v. Trugreen Landcare, LLC*, 769 F. Supp. 2d 175, 185 (W.D.N.Y. 2011). In other words, the FLSA makes criminal such wage deductions from paychecks. Yet, no court has ever held that the criminality of such deductions provides an exemption from liability under the joint employer doctrine. Otherwise, a joint employer could always argue that it was unforeseeable that the other joint employer would fail to pay the employee due to such nonpayment being a criminal act under 29 U.S.C. § 216(a). Such an absurd result could not have been intended. If anything, the coexistence of criminal penalties alongside civil remedies in the FLSA confirms that the failure to pay wages is always foreseeable criminal conduct. It is a textbook example of the exception proving the rule.

As a practical matter, creating an unforeseeable criminal activity exception to the joint employer doctrine provides an enormous hurdle for workers to receive their wages. If, for example, a defendant-employer asserts that a joint employer criminally deducted or withheld wages, but a jury has yet to convict the joint employer, will the employer be permitted to stay its civil case pending disposition of the criminal case? Or will such

criminal liability simply be determined in the civil case? Certainly, a valid question given that nothing in the record established that GLS was convicted of anything, much less of criminally withholding Tolentino’s wages.

Indeed, the trial court failed to even specify the criminal statute that was allegedly violated by GLS vis-à-vis Tolentino’s wages. To the trial court, the mere existence of a criminal indictment of GLS was sufficient to establish that a crime had taken place and therefore that Tolentino could be deprived of the right to recover his wages from the unindicted joint employer. Under this rationale, workers must now rebut a criminal indictment of one of their joint employers by arguing that its wage deductions were not intentional violations in order to receive their earned wages. Such a litigation burden is nonsensical and would render the statute nearly impossible to enforce.

**3. The MMWL’s remedial purpose forecloses any exception to the joint employer doctrine based on circumstances beyond an employee’s control or on an employer’s contractual arrangements.**

The trial court’s reading of the joint employer regulation also conflicts with the overarching purpose of the MMWL. Like the FLSA, the MMWL is “remedial and humanitarian in purpose.” *Specht v. City of Sioux Falls*, 639 F.3d 814, 819 (8<sup>th</sup> Cir. 2011) (citing *Bensoff v. City of Va. Beach*, 180 F.3d 136, 140 (4<sup>th</sup> Cir. 1999) (internal quotation and citation omitted) (emphasis added)). That purpose is to rectify the “unequal

bargaining power as between employer and employee . . . ,”<sup>9</sup> and “to protect the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others.” *Specht*, 639 F.3d at 819 (citing *Bensoff*, 180 F.3d at 140).

As a remedial statute, the MMWL “should be construed liberally to include those cases which are within the spirit of the law and all reasonable doubts should be construed in favor of applicability to the case.” *MCHR v. Red Dragon Rest., Inc.*, 991 S.W.2d 161, 166-67 (Mo. App. W.D. 1999) (citing *State ex rel. Ford v. Wenskay*, 824 S.W.2d 99, 100 (Mo. App. E.D. 1992)). Further, the MMWL must be afforded “a broad interpretation ‘in order to accomplish the greatest public good.’” *Id.* at 167 (citing *Hagan v. Director. of Rev.*, 968 S.W.2d 704, 706 (Mo. 1998)). Here, the trial court’s holding does precisely the opposite. By chiseling away at the joint employer doctrine through the creation of an otherwise baseless common law defense, the trial court narrowed the public good accomplished by the MMWL, leaving workers like Tolentino without pay, simply because the actions of a joint employer in withholding his pay were so bad they could be classified as criminal.

In effect, the trial court created two classes of workers. Under its newfound exception, the first class of workers is entitled to receive pay from their joint employers, even if one unlawfully deducts wages from a paycheck. The second class of employees is unentitled to pay from their joint employers because their wage deductions also happened to violate another criminal statute. Yet, the injury to both classes of employees is identical. With respect to the first class, the government has decided not to prosecute a

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<sup>9</sup> *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 706-07 (1945).

claim for the underpayment of wages under the FLSA or some other statute. The right to earned wages thus turns—not on the employee’s right to his wages—but on circumstances beyond the employee’s control. More particularly, the right is dictated by the mental state of one of the joint employers; whether the government decides to prosecute that employer; and apparently without regard to whether a jury ever convicts that employer.<sup>10</sup> Remarkably, the worse the employer’s behavior (*i.e.*, criminal failure to pay wages), the less entitled the employee is to receive wages. Such a rule does not accomplish the *greatest public good*; rather, it denigrates it.

In any joint employer relationship there are at least three parties: two joint employers and an employee. In many instances, particularly those dealing with employee staffing agencies, joint employers can be categorized as primary and secondary employers. Primary employers are ones who receive the direct benefit of the work done. Secondary employers are responsible for the payment of wages. If the secondary employer acts irresponsibly or unscrupulously, the law requires the primary employer to be responsible for paying the employee’s wages because: (1) the primary employer has already received the benefit of the employee’s work; and (2) it is unfair for the employee to be punished for his employers’ contractual arrangements. *See Sec. of Labor v. Lauritzen*, 835 F.2d 1529, 1544-45 (7<sup>th</sup> Cir. 1987) (“The FLSA is designed to defeat rather than implement contractual arrangements.”). Because the Westin received the benefit of Tolentino’s work, it was undoubtedly his primary employer. As such, it is

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<sup>10</sup> As previously noted, it is unclear whether conviction is required.

responsible for Tolentino’s wages regardless of its contractual arrangement to have GLS pay his wages.

In terms of allocating burdens among parties—*the* primary concern of a law meant to rectify “unequal bargaining power”—the question arises: Who should bear the risks associated with using employee staffing agencies? The Westin took a calculated risk in outsourcing labor and not paying its employees directly, but through a third party. The risk being that GLS might be insolvent or unscrupulous and not pay Tolentino’s wages. The trial court’s decision, however, places the burden of that risk on the party who did not assume it and who is *least capable of shouldering it*—Tolentino. Simply put, by choosing not to pay Tolentino directly, the Westin gambled on GLS paying Tolentino’s wages. It took the risk, so it’s fair that it pay the price.

**4. The historical background of wage and hour law in this country confirms that the failure to pay minimum or overtime wages is not a tort.**

Ignoring the remedial nature of the MMWL, the trial court instead created an exception to the joint employer doctrine based on the tort doctrine absolving defendants of liability for unforeseeable criminal acts of third parties.<sup>11</sup> According to the trial court,

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<sup>11</sup> For support, the trial court relied on inapposite case law entirely outside the wage and hour context in which common law tort actions had been brought against a defendant for injuries caused by a third party. (LF1279.) *See L.A.C. ex rel. D.C. v. Ward Pkwy. Shopping Ctr. Co.*, 75 S.W.3d 247 (Mo. 2002) (not finding premises liability for

such tort principles should relieve a joint employer of its duty to pay an employee’s wages if the other joint employer’s failure to pay constituted an unforeseeable criminal act. Wage and hour law was created in the context of contract law, not tort law.

Indeed, wage and hour laws are an explicit rejection of the judge-made doctrine of “liberty of contract.” *See generally*, Kearns, *et al.* eds., *supra*, at 1.2-16. During what became known as the *Lochner* era, courts struck down minimum wage and maximum hour laws as unconstitutional infringements on the “liberty of contract.” *See Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923); *Lochner v. New York*, 198 U.S. 45 (1905). After pushback at the federal level for a court-packing plan, the United States Supreme Court reversed itself and held that such laws were constitutional. *See West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); *United States v. Darby*, 312 U.S. 100 (1941).

Significantly, in none of the cases either striking down or upholding minimum wage and maximum hour laws, did any of the courts suggest that a tort was involved, undoubtedly because “[t]ort law is concerned, above all, with personal injuries.”

LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW*, 223 (3<sup>d</sup> Ed. 2007). The issue was plainly one of contract and the superior bargaining power of employers when it came

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patron raped at shopping mall by third party); *Wellman v. Pacer Oil Co.*, 504 S.W.2d 55 (Mo. banc. 1973) (employer not liable for battery of customer by employee because unforeseeable criminal act); *Henderson v. Laclede Radio Inc.*, 506 S.W.2d 434 (Mo. 1974) (employer not liable for shooting of customer by employee because of unforeseeable criminal act).

to the wages of hourly workers. In no cases since has there been any suggestion that a failure to pay wages constitutes a personal injury of any kind.

If the failure to pay minimum wages and overtime compensation truly is a tort, then plaintiffs should have the ordinary remedies associated with such actions. Workers should be able to recover all types of compensatory damages—not just lost wages—and punitive damages from employers who illegally deprive them of their wages. Damages for emotional distress would be included as well. Of course, such a result would be preposterous,<sup>12</sup> but it is the natural and logical extension of the trial court’s application of tort law to wage and hour law.

The historical background leading to the enactment of modern-day wage and hour law confirms that the failure to pay wages is not a tort and that principles of tort law have no business being imported into the MMWL.

**5. The withholding of wages by a joint employer is foreseeable as a matter of law.**

Even if the common law of torts were an appropriate source to draw upon in the wage and hour context, the trial court’s exception to the joint employer doctrine for unforeseeable criminal acts would still be unsupportable. In other words, it is obviously

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<sup>12</sup> As this Court noted in *Trailner Corp. v. Director of Rev.*, “we always presume the legislature did not intend an absurd result and the canons of construction favor interpretations avoiding unjust and unreasonable ends.” 783 S.W.2d 917, 921 (Mo. 1990).

foreseeable that a joint employer might fail to pay an employee's wages. Wage deductions by a joint employer are foreseeable as a matter of law.

In *Reyes v. Remington Hybrid Seed Co.*, Remington set up a contractor/sub-contractor relationship with Zarate, who was to provide workers for Remington. 495 F.3d 403, 405 (7<sup>th</sup> Cir. 2007). Remington advanced funds to Zarate so that he could pay his crew. *Id.* Zarate, however, did not fully compensate the workers even though Remington had paid him. *Id.* at 405. The court held that both Remington and Zarate were joint employers of the workers, *id.* at 411, and as such, vacated the summary judgment granted in Remington's favor declaring it had no responsibility to the workers. *Id.* at 410.

Here, the Westin and GLS entered into an agreement whereby GLS supplied workers to the Westin and it paid GLS for the workers' labor. (LF0995, ¶¶ 8, 11.) One of those workers, Tolentino, cleaned 122 hotel rooms in 55 hours between April 13, 2008, and April 26, 2008. (LF1278.) Tolentino, however, was not paid for his work; instead GLS gave him a so-called "paycheck" for \$0.00. (LF1034, ¶177; LF1189-91; LF1278.) As in *Reyes*, the Westin paid the contractor employee staffing agency (GLS) rather than the worker. (LF1278.) Just as in *Reyes*, the Westin should be held liable under the joint employer doctrine.

If *Reyes* teaches anything, it is that the failure of a second joint employer to pass on wages to an employee is foreseeable as a matter of law. 495 F.3d at 409. Nonpayment of employees by a subcontractor is so obviously foreseeable that a practice known as a

“holdback” developed in the construction business to deal with it.<sup>13</sup> *Id.* Unlike with violent crime,<sup>14</sup> there is nothing unpredictable about an employer not paying its employees their full wages.<sup>15</sup> The solution for employers contracting with unscrupulous or irresponsible staffing agencies, however, is not to punish workers, but for joint employers to “hold back enough on the contract to ensure that workers have been paid in full” because they are in a superior position to ensure compliance with wage and hour laws. *Id.*

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<sup>13</sup> As described by Judge Easterbrook, a “holdback” is where “[a] general contractor (or project owner) that hires a small, thinly capitalized subcontractor to do a specialized job such as electrical work or plumbing will not make the final payment until the subcontractor demonstrates that it has fully compensated its own workers.” *Id.*

<sup>14</sup> See *L.A.C.*, 75 S.W.3d 247 (not finding premises liability for patron raped at shopping mall by third party); *Wellman*, 504 S.W.2d 55 (employer not liable for battery of customer by employee because unforeseeable criminal act); *Henderson*, 506 S.W.2d 434 (employer not liable for shooting of customer by employee because of unforeseeable criminal act).

<sup>15</sup> This is particularly true for the Westin, a hotel located in metropolitan Kansas City, Missouri, because “[a]ny suggestion that crime is not foreseeable is particularly inappropriate when a downtown metropolitan area is involved, especially when *the case involves a hotel.*” *Virginia D., v. Madesco Invest. Corp.*, 648 S.W.2d 881, 887 (Mo. 1983) (emphasis added).

The joint employer doctrine holds joint employers responsible for each other's unlawful conduct (*e.g.*, not paying employees), and therefore actions which result in employees' non-compensation are foreseeable as a matter of law.<sup>16</sup> Although foreseeability may be relevant when determining a business's liability to invitees for injuries sustained on the premises, it has never been a consideration when deciding whether companies are jointly and severally liable to employees as joint employers. As a

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<sup>16</sup> That such actions are foreseeable is confirmed by the numerous decisions applying the joint employer doctrine to cover businesses hiring employees indirectly through employee staffing agencies. *See Rutherford*, 331 U.S. 722 (holding slaughterhouse employing "meat boners" hired through another company was their employer); *Barfield*, 537 F.3d 132 (hospital that hired nurses through an employee staffing agency was the joint employer of nurses); *Reyes*, 495 F.3d 403 (company that used workers hired through contractor to detassel and rogue corn plants held to be joint employer); *Bastian*, 2008 WL 4671763 (defendant call center that hired through three different employee staffing agencies was joint employer of those employees); *Ansoumana v. Gristede's Operating Corp.*, 255 F. Supp. 2d 184 (S.D.N.Y. 2003) (supermarket and drug store chain that hired delivery workers through employee staffing agency was joint employer of those employees); *Flores v. Albertson's Inc.*, No. 01-0515, 2003 WL 24216269 (C.D. Cal. Dec. 9, 2003) (supermarkets who hired janitors through employee staffing agencies were joint employers of janitors).

matter of law, once a party is determined to have been a joint employer, its duty to employees is fulfilled only when the employee is paid.

**B. The special relationship between employer and employee supports joint employer liability for criminal wage deductions by joint employers.**

Even assuming that principles of tort law should apply in the wage and hour setting, a dubious proposition at best, the trial court’s application of the unforeseeable criminal activity doctrine overlooks Missouri law holding that a party can be liable for the criminal acts of an unknown third party if a special relationship exists between the plaintiff and the defendant. In *Virginia D., v. Madesco Investment Corp.*, the Court held that because of the special relationship between innkeepers and guests, an innkeeper could be held liable for the criminal acts of third parties. 648 S.W.2d 881 (Mo. 1983). The employer-employee relationship is inarguably one of those special relationships supporting liability for the criminal acts of third parties, or in this case a joint employer.<sup>17</sup>

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<sup>17</sup> See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) (the term “employ” in the FLSA “stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under strict application of traditional agency law principles.”); *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 677 (1<sup>st</sup> Cir. 1998) (“Congress intended the FLSA’s reach to transcend traditional common law parameters of the employer-employee relationship.”).

The special nature of the employer-employee relationship is most apparent in workers' compensation laws. As one court observed, "workers' compensation statutes relate generally to the legal connection or relationship between employer and employee." *Hedglin v. Stahl Specialty Co.*, 903 S.W.2d 922, 925 (Mo. App. W.D. 1995) (citing *Guy v. Arthur H. Thomas Co.*, 378 N.E.2d 488, 490 (Oh. Sup. Ct. 1978)). Notably, the no-fault or strict liability theory of workers' compensation is based on the employer-employee relationship. *See id.* (citing *Cudahy Packing Co. v. Paramore*, 263 U.S. 418, 423 (1923) ("The act is based not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured."); *see also* W. PAGE KEETON, ET AL., PROSSER AND KEETON ON TORTS, § 80, 568 (5<sup>th</sup> Ed. 1984) (the principle of strict liability applies to the workers' compensation acts). So, although business owners may not be liable to patrons for the unforeseen criminal acts of unknown third parties, they are strictly liable to their employees for such injuries.<sup>18</sup>

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<sup>18</sup> Like workers' compensation laws, wage and hour laws were borne of a frustration with, and a rejection of, the common law. *See Hedglin*, 903 S.W.2d at 925 (citing *Guy*, 378 N.E.2d at 490) ("The genesis of workers' compensation in the United States . . . was the inability of the common-law remedies to cope with modern industrialism and its inherent injuries to workers . . ."); *Seminole Tribe v. Florida*, 517 U.S. 44, 166 (1996) (Stevens, J., dissenting) ("It was the defining characteristic of the *Lochner* era, and its characteristic vice, that the Court treated the common-law

In one of the principal cases relied on by the court of appeals, *Pecan Shoppe of Springfield, Mo., Inc. v. Tri-State Motor Transit, Co.*, the land owner was not entitled to bring suit for a tractor-trailer explosion caused by a third party. 573 S.W.2d 431 (Mo. App. 1978). The tractor-trailer's driver who was killed by the explosion caused by a fellow employee, however, would have undoubtedly been entitled to workers' compensation. See *Loughridge v. Overnite Transp. Co.*, 649 F. Supp. 52, 54 (E.D. Mo. 1986) ("Missouri courts have held that the intentional torts of co-employees fall within the definition of employment-related 'accident' in the statute."); *Hood v. TWA, Inc.*, 648 S.W.2d 167, 168 (Mo. App. E.D. 1983) (workers' compensation law provided exclusive remedy for employee assaulted by supervisor spitting on him). Importantly, Missouri's workers' compensation statute also holds joint employers liable for such injuries. R.S.Mo. § 287.130. Thus, the Westin would be liable under the workers' compensation statute for the injuries caused by GLS's agents.

In common law terms, the Westin's liability for GLS's criminal wage deductions is proper because of the special relationship between employers and employees. In statutory terms, the Westin's liability for GLS's criminal activity is proper because of the joint employer doctrine. Whether applying the plain language of the joint employer

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background (in those days, common-law property rights and contractual autonomy) as paramount, while regarding congressional legislation to abrogate the common law on these economic matters as constitutionally suspect.").

regulation or common law principles, the Westin must be responsible for paying Tolentino's duly earned wages.

### **CONCLUSION**

More than 65 years after the United States Supreme Court recognized the doctrine holding joint employers responsible for payment of their employee's wages, the Westin asks this Court to reexamine that doctrine. It does so not based on anything reflected in the text, structure, or history of wage and hour law in this country. Nothing of the sort. Rather, it asks this Court to carve out an exception based on the common law of torts. The people of Missouri, however, explicitly provided that courts should be guided by the FLSA when interpreting the MMWL, not the common law of torts.

The Westin asks this Court to ratify the calculated risk it took with its employees' wages. It asks this Court to give a green light to gambling with employee wages by paying them indirectly through employee staffing agencies. It asks that the burden of this contractual arrangement be placed on low wage workers like Tolentino. This is decidedly against the public good and against the remedial nature of the MMWL.

Under the MMWL, liability is derived from status as a joint employer, not from the degree of foreseeability of one employer withholding wages. The trial court offered no normative reason why the relationship of foreseeability to the duty aspect of negligence in premise liability law or the respondeat superior doctrine should be imported into the joint employer doctrine. Although foreseeability may be relevant to the common law doctrines of premise and vicarious liability, it has no such importance in the statutory framework of wage and hour laws like the FLSA and the MMWL. In any event, the

special relationship between employers and employees provides ample reason for not applying the unforeseeable criminal activity exception to the acts of a joint employer.

For the foregoing reasons, Tolentino respectfully requests that this Court reverse the trial court's March 8, 2012 Order and Judgment granting the Westin's Motion for Summary Judgment.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I hereby certify, as required by Missouri Supreme Court Rule 84.06(c), that the foregoing Appellant's Substitute Brief fully complies with the provisions of Missouri Supreme Court Rule 84.06(b), in that beginning with the Jurisdictional Statement and concluding with the last sentence before the signature block, Appellant's Substitute Brief contains 8,975 words. The word count was generated by Microsoft Word 2010, and complies with the word limitations contained in Rule 84.06(b).

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing Appellant's Substitute Brief was served, via the Missouri Casenet Electronic Filing System, this 3<sup>rd</sup> day of September 2013 to:

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